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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re SINQUE MORRISION,	E067811
On Habeas Corpus.	(Super.Ct.No. WHCJS1500067)
	OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus is denied. Katrina West, Judge.

Alan S. Yockelson, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Randall D. Einhorn and Arlene A. Sevidal, Deputy Attorneys General, for Respondent.

I.

INTRODUCTION

In 2005, a jury convicted petitioner Sinque Morrison of, among other things, first degree murder and attempted murder for his involvement in the shooting death of 11-year-old Mynisha Crenshaw. In 2014, the California Supreme Court held that the natural and probable consequences doctrine is not a valid theory of liability for first degree murder. (*People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*).) Morrison subsequently filed a petition for writ of habeas corpus in which he alleged the trial court impermissibly instructed the jury on the natural and probable consequences doctrine in violation of *Chiu*.

After we summarily denied the petition, the California Supreme Court vacated our opinion and directed us to order the People to show cause why Morrison's requested relief should not be granted. Having received further briefing from the parties, we again deny Morrison's writ petition for habeas corpus relief.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts*[1]

Playboys, Hustlers, and Gangers (PPHG) member Barry Jones's shooting death precipitated the events in this case. Jones, defendant Morrison, and PPHG affiliate Alonzo Monk sought to purchase marijuana at Lynwood Apartments in San Bernardino, but became embroiled in a gun battle with members of a rival gang, the Rolling 60's. Jones was shot and died at a nearby hospital.

Jones's cousin and fellow PPHG member, Shawn Davis, learned of Jones's death and found Morrison and other PPHG members at the home of their leader, Sidikiba Greenwood. Morrison explained he panicked after the shooting and drove around with Jones in the car for awhile before dropping him off at the hospital.

Within days of Jones's death, his family held a car wash to raise money for his burial. PPHG members attended the car wash, including Morrison and Barnett. According to Davis, Morrison blamed the Rolling 60's for Jones's death and urged revenge, stating, "[W]e was [sic] going over there [to] take care of business, and N---ers going to get killed . . . ." Greenwood similarly exhorted the group, "[O]ur homie just got

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[1] In July 2011, our colleagues in the Fourth District, Division Three affirmed Morrison's convictions. (*People v. Barnett* (July 28, 2011, G041416) [nonpub.opn.].) The following facts are drawn from the unpublished opinion in that matter with some modifications.

killed. You guys are just going to let this ride?" Someone mentioned a so-called four-day rule among PPHG members, requiring retaliation within four days.

Davis called Monk after the car wash to meet at Greenwood's home for further planning. According to Monk, Morrison and Barnett were at the meeting, along with Patrick Lair and several other PPHG members. Lair testified Morrison concluded, "[W]e can't let it ride. We can't let them get away with killing Little J-Blue," a reference to Jones. Monk armed Morrison with a semiautomatic weapon and the .357-caliber revolver Jones used in the fatal shootout. Morrison or his brother departed the meeting briefly and returned with a duffle bag containing an assault rifle and a hunting rifle. When the assault rifle was given to Harold Phillips, Monk questioned Phillips's ability to handle the weapon, but Morrison threatened, "He better know how to use it" or Morrison would "shoot him in his head if not." Davis testified Greenwood armed him and Lair with .45-caliber semiautomatic weapons before informing the PPHG cohort it was time to "[g]o take care of your business." The men piled into four different cars; according to Monk, everyone was armed and prepared to retaliate for Jones's death.

One of the victims, Jaynita McWilliams, testified she and two of her sisters, including Mynisha, noticed several cars filled with "a lot" of men drive slowly past them as they walked home to Lynwood Apartments. McWilliams relayed the incident to her mother, who warned the girls to stay in the apartment.

In the meantime, Morrison arrived at the Lynwood Apartments in the lead car. A resident of the apartment complex observed a group of eight men, dressed in black with rags covering their faces, exit the vehicles. One of the men pulled weapons from a vehicle's backseat and distributed them. The group then proceeded into the apartment complex. Another resident looked down from her apartment and saw the men, all armed, walking through the complex. Barnett, who had separated from the group to serve as a lookout, returned on the run, stating an armed man was approaching. A shot rang out from Barnett's group. Davis had fired his weapon at the approaching man, who turned out to be Davis's cousin, Lucky Kelly. Kelly was unharmed, but the group panicked and returned to their vehicles. Some departed, but the remainder, including Morrison and Barnett, acted swiftly when a PPHG member, Marquis Taylor, ran up to the group claiming apartment 22 belonged to the Rolling 60's.

Morrison, Barnett, and several others made their way to apartment 22, lined up in formation outside the apartment, and fired a barrage of up to 30 shots into the apartment. Investigators later recovered .45-caliber and nine-millimeter casings and a live .22-caliber round at the apartment. 11-year-old Mynisha Crenshaw suffered four gunshot wounds, including a fatal shot that passed through her chest, right lung, heart, aorta, and pulmonary artery. She bled to death. Her sister Jaynita suffered a gunshot wound that shattered the bones in her right arm, requiring a prosthesis and continuing therapy.

The PPHG members returned to Greenwood's home as he had instructed them. Lair, who saw Morrison and Barnett standing in formation outside apartment 22 and saw Morrison fire into the apartment, had been left behind by the group. Lair took a cab home. Morrison "disciplined" Barnett and another PPHG member by inflicting a beating on them for leaving Lair behind.

In a police interview, Barnett admitted his lookout role at the scene and corroborated the attack on apartment 22, including shots from an assault rifle, and he confirmed the earlier shot fired at Kelly. He also admitted his presence at the car wash and knowledge of PPHG discussions at Greenwood's house about avenging Jones's death.

Lair and Davis received threats against their lives and against close relatives if they testified. Lair received a "kite" or note in prison that warned him, "[Y]ou['re] dead if you get on the stand and we know that you gave a statement [and] that you're supposed to get on the stand against us . . . if we can't get you, we are going to kill someone close to you . . . we're going to kill one of your family members. We're going to kill your mom, somebody." The kite instructed Lair to "play crazy when you get on the stand. That way you might get lucky and be able to keep your deal . . . ."

One of the sisters walking home with Jaynita before the shooting identified Morrison as an occupant in the lead car of the caravan that passed her and her sisters. The prosecution's gang expert, Detective Travis Walker of the San Bernardino Police Department, identified Morrison as an "original gangster" who joined PPHG around 1986

or 1987, near the time of its founding, and climbed to the top tier of PPHG's hierarchy. The expert further explained that Morrison's presence at Jones's slaying entailed a special duty to participate in the retaliatory strike. The police began searching for Morrison within 11 hours of the slaying, but he had fled to Georgia, where he was arrested three weeks later.

B. *Procedural Background*

A jury convicted Morrison of, among other things, one count of first degree murder (Pen. Code, § 187, subd. (a); count 1) and two counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664; counts 2 & 3). In 2011, our colleagues in the Fourth District, Division Three upheld Morrison's convictions. (See *People v. Barnett, supra,* G041416.)

In 2015, Morrison filed a petition for writ of habeas corpus in the trial court. The thrust of the petition was that the trial court erroneously instructed the jury on first degree murder and attempted murder under *Chiu*, which was issued after his convictions, and applied retroactively. (*In re Martinez* (2017) 3 Cal.5th 1216, 1222.) In January 2017, the trial court denied the petition.

Morrison filed a petition for writ of habeas corpus in this court. We summarily denied the petition in March 2017.

Morrison sought review in the California Supreme Court. In April 2019, the California Supreme Court transferred the matter back to this court with directions to vacate our March 2017 order denying Morrison's petition for writ of habeas corpus, and to order the People to show cause "why petitioner is not entitled to the relief request."

III.

DISCUSSION

A. *Habeas Corpus Principles and Standard of Review*

When, as here, a habeas petition claims the trial court incorrectly instructed the jury, our review is de novo. (*People v. Poser* (2004) 32 Cal.4th 193, 218.) "We determine whether the trial court fully and fairly instructed the jury on the applicable law. [Citation.] When making this determination, we consider the instructions taken as a whole; we also presume jurors are intelligent people capable of understanding and correlating all of the instructions they were given. [Citations.]" (*In re Loza* (2018) 27 Cal.App.5th 797, 800 (*Loza*).)

"[H]abeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, superseded by statute on other grounds as stated in *Satele v. Superior Court* (2019) 7 Cal.5th 852, 857.) "[T]he writ of habeas corpus permits a person deprived of his or her freedom, such as a prisoner, to bring before a court evidence from outside the trial or appellate record, and often represents a prisoner's last chance to obtain judicial review." (*In re Reno* (2012) 55 Cal.4th 428, 450.) "Because a petition for a writ of habeas corpus seeks to

collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

B. *The Trial Court Properly Instructed the Jury on First Degree Murder*

The People offered four theories of Morrison's liability for first degree murder: (1) direct liability as a perpetrator under CALCRIM No. 520; (2) direct aiding and abetting of first degree murder under CALCRIM No. 401; (3) conspiracy to commit murder under CALCRIM No. 563; and (4) murder based on the natural and probable consequences of brandishing a firearm under CALCRIM No. 403. Morrison contends the jury was improperly instructed that he could be found guilty of first degree murder under the natural and probable consequence doctrine, which is impermissible under *Chiu, supra*, 59 Cal.4th 155. We disagree.

In *Chiu, supra*, 59 Cal.4th 155, the California Supreme Court held that a defendant may not be found guilty of first degree murder under the natural and probable consequences doctrine. The court reasoned that first degree murder requires a "uniquely subjective and personal" mental state that shows "willfulness, premeditation, and deliberation." (*Id.* at p. 166.) In contrast, under the natural and probable consequences doctrine, an aider and abettor can be liable for murder, "even if unintended, if it is a natural and probable consequence of" another crime. (*Id.* at p. 161.) The court held that "the connection between the [aider and abettor's] culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree

murder" under the natural and probable consequences theory. (*Id.* at p. 166.) Accordingly, the court held that an aider and abettor can be guilty of second degree murder—but not first degree murder—under the natural and probable consequences theory. (*Ibid.*) An aider and abettor therefore may be liable for premediated first degree murder only if "based on direct aiding and abetting principles." (*Id.* at p. 159.) The court explained that "[a]n aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder." (*Id.* at pp. 166-167.)

In *Chiu*, the jury was improperly instructed "that to find defendant guilty of first degree murder, the People had to prove that *the perpetrator* acted willfully, deliberately, and with premeditation, and that all other murders were of the second degree." (*Chiu*, *supra*, 59 Cal.4th at pp. 160-161, italics added.) In other words, the instruction allowed the jury to find the defendant—an aider and abettor—guilty of first degree murder based on the perpetrator's (his codefendant's) premeditation and deliberation. And no other instruction required that the jury find that the *defendant* acted with the culpable intent required for first degree murder, *i.e.*, that he acted willfully, deliberately, and with premeditation.

People v. Stevenson (2018) 25 Cal.App.5th 974 (*Stevenson*), review granted November 14, 2018, S251071,[2] shows that *Chiu* error does not necessarily occur even if the jury is instructed on the natural and probable consequences doctrine on a first degree murder charge. In *Stevenson*, the defendants, a trio of gang members, fired multiple shots into a car in an attempt to kill a rival gang member, Joshua Alford. The defendants six victims, killing three of them, including Alford. (*Id.* at pp. 979-980.) The defendants were charged with first degree murder, and the jury was instructed on three theories of liability: "[D]irect liability as a perpetrator under CALCRIM No. 520, direct aiding and abetting of murder under CALCRIM No. 401, and murder based on the natural and probable consequences of conspiracy to murder Alford under CALCRIM No. 417." (*Id.* at p. 981, fn. omitted). The jury was further instructed that the defendants could be liable for first degree murder for killing the two victims other than Alford "if [the] killings were the natural and probable consequences of aiding and abetting the murder of Alford." (*Ibid.*) The jury, however, also was instructed with CALCRIM No. 521, which provided in part that "'[a] defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation . . . . The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than

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[2] The Supreme Court appears to have granted review in *Stevenson* to address its analysis of a "kill zone" theory at issue here. The court granted review of *Stevenson* pending the outcome of *People v. Canizales* (2014) 229 Cal.App.4th 820, rev. granted Nov. 19, 2014, S221958, which the court issued in June 2019. (See *People v. Canizales* (2019) 7 Cal.5th 591.) The court then dismissed and remanded *Stevenson*. (See *People v. Stevenson* (Sept. 18, 2019) 2019 WL 4493488.) *Stevenson* therefore remains good law.

a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.'" (*Id*. at pp. 981-982.)

The *Stevenson* Court held that "[t]he error identified in *Chiu* did not occur . . . ." (*Stevenson, supra,* 25 Cal.App.5th at p. 984.) The court explained that the error in *Chiu* "allowed the jury to find an aider and abettor guilty of first degree murder based on the perpetrator's premeditation and deliberation." (*Stevenson, supra*, at p. 983.) That error did not occur in *Stevenson* because the jury instructions provided: (1) "'A *defendant* is guilty of first degree murder if the People have proved that *he* acted willfully, deliberately, and with premeditation'" (*ibid*); (2) "'acted willfully if he intended to kill. [The] defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. [The] defendant acted with premeditation if he decided to kill before completing the act that caused death'" (*id*. at pp. 983-984); and (3) "'[i]f any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree.'" (*Id.* at p 984.) Thus, unlike in *Chiu*, "the jury [in *Stevenson*] was required to find that each defendant committed the crimes with the required deliberation and premeditation before it could find that defendant guilty of first degree murder." (*Stevenson, supra,* at p. 984.)

Loza, supra, 27 Cal.App.5th 797, illustrates when a *Chiu* error occurs. Cesar Loza handed a gun to a fellow gang member, Oscar Andrade, who shot and killed someone. (*Loza, supra,* at p. 799.) Loza and three others were charged with first degree murder and tried together. (*Id.* at p. 802.) The trial court instructed the jury that the instructions applied to all four defendants equally. (*Id.* at p. 802.) The trial court provided the jury with, among others, the following instruction related to first degree murder: "'If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of *the defendant* to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion . . . it is murder of the first degree.'" (*Id.* at pp. 802-803.) The instruction went on: "'To constitute a deliberate and premeditated killing, *the slayer* must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides to and does kill.'" (*Id*. at p. 804.)

The *Loza* Court found these instructions violated *Chiu*. The court reasoned that the instructions impermissibly allowed the jury to find Loza guilty of first degree murder if it found that "the slayer" acted with deliberation and premeditation, which "essentially mirrored the error that occurred in *Chiu*," where the jury was instructed that the defendant was guilty of first degree murder if "'*the perpetrator*'" acted with deliberation and premeditation. (*Loza, supra,* 27 Cal.App.5th at p. 804.)

The *Loza* Court then rejected the People's argument that *Stevenson* applied. (*Loza, supra*, 27 Cal.App.5th at p. 805.) The court explained that "[u]nlike *Stevenson*,

the court's instructions here allowed the jurors to find the defendant (Loza) guilty of first degree murder if they found that one of the other three defendants—the 'slayer' Andrade—deliberated and premeditated." (*Loza*, *supra*, at p. 805.) This, according to the *Loza* Court, was "precisely the type of instructional error" that *Chiu* prohibits. (*Loza*, *supra*, at p. 805.) Therefore, *Loza* shows that no *Chiu* error occurred in the instant case.

Stevenson is controlling here. "The critical holding in *Chiu* is that the perpetrator's mental state of premeditation and deliberation 'is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine.'" (*People v. Mejia* (2019) 40 Cal.App.5th 42, 49, review granted Jan. 2, 2020, S258796 quoting *Chiu, supra,* 59 Cal.4th at p. 166.) Although the jury here was instructed on the natural and probable consequences doctrine and the instruction allowed the jury to find Morrison guilty of murder and/or attempted murder, the instruction did "not address the degree of that murder." (*Stevenson, supra,* 25 Cal.App.5th at p. 983.) Other instructions, however, provided that Morrison was guilty of first degree murder *only if* the jury found that he had the requisite intent of acting willfully, deliberately, and with premeditation. Specifically, Jury Instruction No. 521 provided in part: "If you decide that *defendant Sinque Morrison* has committed murder, you must decide whether it is murder of the first or second degree." "The defendant is guilty of first degree murder if the People have proved that *he* acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if *he* intended to kill. The defendant acted *deliberately* if *he* carefully weighed the considerations for and

against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if *he* decided to kill before committing the act that caused the death." "All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Jury Instruction No. 641 explained: "As to *Sinque Morrison only*, you will be given verdict forms of guilty of first degree murder, guilty of second degree murder, and not guilty." "I can accept a verdict of guilty of a lesser crime only if all of you have found a defendant not guilty of the greater crime." "If all of you agree that the People have proved beyond a reasonable doubt that a defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict form." "If all of you agree that the People have not proved beyond a reasonable doubt that a defendant is guilty of first degree murder but also agree that a defendant is guilty of second degree murder, complete and sign the form for guilty of second degree murder. Do not complete or sign any other verdict forms. You may return a verdict of guilty of second degree murder only if you have found a defendant not guilty of first degree murder."

These instructions make clear that, "unlike in *Chiu*, the jury [in the instant case] was required to find that [Morrison] committed the crimes with the required deliberation and premeditation before it could find [him] guilty of first degree murder." (*Stevenson*,

supra, 25 Cal.App.5th at p. 984.) The jury was not erroneously instructed like the *Chiu* and *Loza* juries that it could find Morrison guilty of first degree murder based on the "perpetrator's" or the "slayer's" intent. (*Loza*, *supra*, 27 Cal.App.5th at p. 805 ["Unlike *Stevenson*, the court's instructions here allowed the jurors to find the defendant (Loza) guilty of first degree murder if they found that one of the other three defendants—the 'slayer' Andrade—deliberated and premeditated.]; *Chiu, supra*, 59 Cal.4th at pp. 160-161 ["[T]o find defendant guilty of first degree murder, the People had to prove that the *perpetrator* acted willfully, deliberately, and with premeditation."].)

Instead, the jury instructions here clearly stated that Morrison alone was charged with first degree murder, and that the jury could find Morrison guilty of first degree murder *only if* it found that *he* acted willfully, deliberately, and with premeditation. In finding him guilty of first degree murder, the jury necessarily found that Morrison acted with the required intent, deliberation, and premeditation before he committed the murder. (See *People v. Johnson* (2016) 62 Cal.4th 600, 641.)

Our review of the jury instructions confirms this conclusion. As in *Stevenson*, the jury was instructed that it had to convict Morrison of second degree murder if it had any doubt that he was guilty of first degree murder. (*Stevenson, supra*, 25 Cal.App.5th at p. 984.) The jury therefore "was required to find that [Morrison] committed the crime[] with the required deliberation and premeditation before it could find [him] guilty of first degree murder." (*Ibid.*)

In short, "[t]he error identified in *Chiu* did not occur here." (*Stevenson*, *supra*, 25 Cal.App.5th at p. 984.) We therefore deny Morrison's petition for writ of habeas corpus regarding his conviction for first degree murder.

C. *The Trial Court Properly Instructed the Jury on Attempted Murder*

Morrison contends the trial court impermissibly instructed the jury that it could convict him of attempted murder under the natural and probable consequences doctrine. He argues *Chiu* should be extended to the attempted murder context.

Morrison concedes *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*) forecloses this argument. As Morrison acknowledges, the California Supreme Court held in *Favor* that an aider and abettor can be found guilty of attempted murder with premeditation and deliberation under the natural and probable consequences doctrine. (*Id*. at p. 872.) In *Chiu*, the court addressed *Favor*'s holding and explained why it did not apply in the first degree murder context at issue in *Chiu*. (*Chiu*, *supra*, 59 Cal.4th at pp. 162-163.) In doing so, the *Chiu* majority reaffirmed *Favor* despite the dissent of two justices, who thought the majority wrongly "stretche[d] the natural and probable consequences doctrine beyond principled application." (*Ibid*.; *People v. Favor*, *supra*, at p. 884 [dis. opn. of Liu, J.].) We therefore decline Morrison's invitation to ignore *Favor* as "[b]ased on [f]lawed [p]remises."

We acknowledge a divided panel of our colleagues in the Fourth District, Division Three recently extended *Chiu* to the premeditated attempted murder context as Morrison urges us to do. (*People v. Mejia*, *supra*, 40 Cal.App.5th 42, review granted Jan. 2, 2020,

S258796.) The majority agreed with the petitioner that there is "no principled reason for any distinction between the results in *Chiu* and in *Favor*." (*Id.* at p. 46.) However, as Justice Bedsworth noted in dissent, that "may be right," but it is up to "the Supreme Court to tell *us* whether that is the case." (*Id.* at p. 54 [dis. opn. of Bedsworth, J.].) We agree with Justice Bedsworth that we are bound to follow *Favor*, which remains good law, until the Supreme Court rules otherwise. (*Ibid.*; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also *People v. Gallardo* (2017) 18 Cal.App.5th 51, 85 ["Simply put, there is no language in *Chiu* that overrules or otherwise questions the continuing validity of . . . *Favor*."].)

Morrison nonetheless suggests *Favor* is no longer good law in light of the United State Supreme Court's decision in *Alleyne v. United States* (2013) 570 U.S. 99. We disagree. *Alleyne* held that the jury—not the trial court—must find true beyond a reasonable doubt any fact that increases the mandatory minimum penalty for a crime. (*Ibid.*) *Alleyne* does not apply because Morrison's sentence does not turn on any judicial fact-finding. (See *People v. Henriquez* (2017) 4 Cal.5th 1, 48 ["The trial court in this case found no facts that increased the mandatory minimum penalty for defendant's crime, so *Alleyne* does not affect the analysis."].)

Favor remains controlling here. Accordingly, we deny Morrison's petition for writ of habeas corpus as to his conviction for attempted murder.

IV.

DISPOSITION

The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.